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Article 6

Agency - Scope of Employment - Effect of Employee's Deviation From a Prescribed Route on Liability of Employer

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RECENT DECISIONS

Agency — Scope of Employment — Effect of Employee's Deviation from a Prescribed Route on Liability of Employer — Plaintiff recovered a judgment for damages to her car from the defendant public utility company. The damages were caused by the negligence of the defendant's employee, a meter reader. The defendant's employee had picked up several other meter readers in a company car and had left his prescribed route in violation of company rules. The employee-driver was returning to his route when the accident occurred. *Held:* Judgment for plaintiff reversed. The employee-driver was not using the automobile for the benefit of his employer and was not on his employer's business when the accident occurred, therefore he was not within the scope of his employment. *Skapura et al. v. Cleveland Electric Illuminating Co., 100 N.E. (2d) 700 (Ohio App., 1950).*

Ohio, in effect has a "control test" for deciding whether or not an employee is within the scope of his employment when driving his employer's auto.[1] This test seemingly puts an employee outside the scope of his employment whenever he leaves a route prescribed by the employer without regard either to time or distance. The Ohio Court's question is, did the employee leave his employer's control (i.e., the route as prescribed by the employer) ?[2] This is a very strict application of the common law rule that the owner of an automobile is not liable for damages caused by a servant acting outside the scope of his employment.[3] However, the Ohio Court does recognize that a reasonable inference may be drawn that the employee is the agent of the employer where the automobile is owned by the employer.[4] This inference is easily rebutted. Even a slight deviation from a prescribed route by an employee will take him out of his scope of employment.

A similar result is reached in Arkansas where it has been held that when an employee steps aside from the employer's business for any purpose of his own, and for however short a time, the employee is, while he is acting for himself, outside the scope of his employment.[5]

The test applied by the several state courts are varied with regard to when an employee is without the scope of his employment or when an employee leaves the scope of his employment or returns to it. In a

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[1] Senn. v. Lachner, 100 N.E. 2d 419 (Ohio, 1950): "Was the salesman (employee) acting under the direction of the defendant (employer) at the time of the collision?" cf. Rogers v. Allis-Chalmers Manufacturing Co., 153 Ohio St. 513, 92 N.E. (2d) 677 (1950).

[2] Senn v. Lachner, *supra,* note 1.

[3] Gemma v. Rotondo, 62 R.I. 293, 5 A. (2d) 297, 122 A.L.R. 223 (1939).

[4] *Supra,* note 2.

[5] Sweeden v. Atkinson Improvement Co., 93 Ark. 402, 125 S.W. 439 (1910); Healy v. Cockrill, 133 Ark. 377, 202 S.W. 229 (1918); Carter Truck Line v. Gibson, 195 Ark. 994, 115 S.W. (2d) 270 (1938).

Louisiana case[6] the defendant's truck driver was operating a delivery truck at an excessive rate of speed when an accident occurred. The defendant alleged that had the driver followed the direct route in making the deliveries, the driver could not have been where he was when the accident occurred. The driver alleged that he was returning to his employer's store when the accident took place. The Louisiana Court held that where an employee leaves the scope of his employment for his own benefit, it is not necessary for him to return absolutely to the zone or territory of his employment, but he need only to be returning to such zone or territory of employment to re-enter the scope of his employment. This rule would, if applied to the instant case, change the result of the appeal, for the employee in the main case was, in fact, returning to the route prescribed by his employer.

Only the courts of the State of Washington seem to use any kind of a distance measure to determine whether or not the employee is within the scope of his employment. In a case involving an employee's use of his employer's delivery truck, though with general instructions, without permission to use it for purely personal purposes, the Washington Court laid down a test that involved the amount of deviation as compared to the whole trip the employee is to make.[7] The court in effect said that a deviation of a few blocks in a trip of several miles may not take the employee outside the scope of his employment, while a deviation of several blocks in a trip of only a few blocks may do so. There is no hard and fast rule as to a particular ratio that either is or is not scope of employment, but the individual facts and surrounding circumstances along with this rule would seem to be an aid to the court.[8] Under such a rule, the employee may have deviated slightly from his prescribed route and still be within his scope of employment. It would not be difficult to find a situation where an injured plaintiff would have better protection under this rule.

The Wisconsin Supreme Court has laid down a rather unique test or method for deciding whether or not, in a particular case, the employee was within the scope of his employment. In a case in which this test was applied,[9] the plaintiff "Red Cap" was escorting a woman from a railroad station to a taxi. The plaintiff took the women to a taxi which was occupied by one other person and the woman refused to enter the taxi. The woman directed the plaintiff to another taxi. The driver of the first taxi became angry at the loss of the fare and assaulted the

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[6] Cusimano v. A. S. Spiess Sales Co., 153 La. 551, 96 So. 118, 45 A.L.R. 487 (1923); Glass v. Wise, 155 La. 477, 99 So. 409 (1923).
[7] Leuthold v. Goodman, 22 Wash. (2d) 583, 157 P. (2d) 326 (1945).
[8] *Supra*, note 7.
[9] Linden v. City Car Co., 239 Wis. 236, 300 N.W. 925 (1941).
See also Fultz v. Lange, 238 Wis. 342, 298 N.W. 60 (1941).

plaintiff. The Wisconsin test, which may well be called the "intent test," was put this way by Justice Wickhem:

> ". . . The test (for scope of employment) is whether the servant has stepped aside from the business of his principal to accomplish an independent purpose of his own, or whether he was actuated by an intent to carry out his employment and to serve his master."[10]

In the application of this test, an employee could, in fact have deviated from the route prescribed by his employer, and still be within the scope of his employment. There is the possibility that by applying this test to the case under discussion, a different result could have been possible. Assume that the driver of a car owned by his employer aids another employee in the completion of that other employee's duties. That might well be done with the intent to aid the employer, and yet in fact be a deviation from a prescribed route. This test, in application at least, does not automatically put an employee outside the scope of his employment for any deviation which would be the result from a strict application of the common law rule.[11] The Wisconsin rule appears to lend itself to wide application without strain or hardship on the parties.

A rule that puts an employee outside the scope of his employment where there is any deviation is a harsh one and should not be extended. The Restatement of Agency[12] states that if the servant is actuated by the purpose to serve his master's business to any appreciable extent, the master should be subject to liability. This rule would, it seems, give a result similar to the rules of Wisconsin and Washington. The Restatement rule would seem to be a better rule than the one applied in the instant case. Naturally, where there is a clear and certain deviation from the scope of his employment that is more than a slight deviation, and such deviation in no way benefits the employer, the employer should not be held.

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Constitutional Law — Church and State — Validity of "Released Time" Program — Petitioners, parents of public school children, brought this proceeding to compel the Board of Education of the City of New York to halt the released time program for religious education in the public schools of New York City. This program permitted parents to withdraw their children from the public school for one hour per week to receive religious instruction. Petitioners, who did not avail themselves of the program and were in no wise obliged to do so, challenged the constitutionality of the released time program on the

[10] Linden v. City Car Co., supra, note 9.
[11] *Supra*, note 3.
[12] RESTATEMENT, AGENCY, Sec. 236, Comment (b).